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THE LOGAN BILL

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In the last session of Congress, Senator Logan of Kentucky introduced a bill[1] to establish a United States Court of Appeals for Administration,[2] to which would be transferred the jurisdiction now exercised by the federal district courts and the Circuit Court of Appeals in reviewing certain enumerated classes of administrative orders.[3]

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[1] S. 3676, 75th Congress, 3rd Sess.

[2] Sec. 1 of the bill reads as follows:

Section 1. There is hereby created a United States Court of Appeals for Administration (hereinafter referred to as the court), organized and constituted as follows:

(a) The court shall be composed of a chief justice and ten associate justices who shall be selected solely with regard only to their qualifications and fitness to perform the special duties of the court.

(b) The chief justice and the associate justices shall be appointed by the President by and with the advice and consent of the Senate. They shall hold office during good behavior and may be retired as provided in section 714 of the Revised Statutes, as amended.

(c) The chief justice and each associate justice shall receive a salary of $12,500 per year payable monthly out of the Treasury of the United States.

[3] Subsection (d) of Sec. 4 enumerates the types of orders and decisions within the jurisdiction of the proposed court as follows:

(d) The jurisdiction of the court shall extend to the following orders and decisions:

(1) Decisions of the United States Board of Tax Appeals (26 U. S. C. 641).

(2) Decisions of the Processing Tax Board of Review in the Treasury Department in respect to the Processing tax (7 U. S. C. 648).

The establishment of new courts to adjudicate specialized controversies is not new in legal history. There have been

(3) Orders of the Interstate Commerce Commission, except orders for the payment of money, as follows:

(A) Orders under the Interstate Commerce Act (*28 U. S. C. 43–48; 49 U. S. C. 16 (12)*).

(B) Cease and desist orders under the Clayton Act (15 U. S. C. 21).

(C) Cease and desist orders under the Motor Vehicle Act.

(D) Orders issued under the authority of the Motor Carriers Act (49 U. S. C. 305 (h); 36 Stat. 1148-1149; 38 Stat. 219; 28 U. S. C. 43–*48*).

(E) Negative orders under Motor Carriers Act issued solely because of a supposed lack of power (49 U. S. C. 305 (h); 28 U. S. C. 43).

(4) The following orders of the Federal Communications Commission:

(A) General Orders of the Commission (47 U. S. C. *Supp. III 1935–37*, 402 (a)), *except orders for the payment of money.*

(B) Cease and desist orders under the Clayton Act (15 U. S. C. 21).

(C) Orders and decisions in respect to construction permit, radio-station license and renewal, and modification and suspension of license (47 U. S. C. *Supp. III, 1935–7*, 402 (b)).

(D) Decisions in respect to radio requirements, installations, or exemptions from prescribed radio requirements on board ship (47 U. S. C. 361).

(5) Orders and decisions of the Commodities Exchange Commission—

(A) In refusal to designate a board of trade as a contract market (*7 U. S. C. 8, 10*).

(B) In re suspension or revocation of the designation of a board of trade as a contract market (7 U. S. C. 8. *10*)

(6) Orders of the Federal Power Commission in respect to the regulation of electric companies engaged in interstate commerce (49 Stat. 860-861, *16 U. S. C. 825 1*).

(7) Orders of the Federal Trade Commission:

(A) Cease and desist orders under the Clayton Act (15 U. S. C. 21).

(B) Cease and desist orders under the Federal Trade Commission Act (15 U. S. C. 45, *Pub. No. 447, 75th Cong. 3rd Sess. 15 U. S. C. 65*).

(8) Orders of the National Bituminous Coal Commission under the Bituminous Coal Act of 1937 (Sec. 6(b), 50 Stat. 85).

(9) Orders of the National Labor Relations Board: Cease and desist orders from unfair labor practices (29 U. S. C. 160 (*f*) (i)).

(10) Orders of the Securities and Exchange Commission—

(A) In respect to the issue of securities (15 U. S. C. 77(i)).

(B) In respect to security exchanges (15 U. S. C. 78(y)).

numerous examples of special courts established to cope with new problems, or problems which required a different treatment from the great mass of cases coming to the courts of general jurisdic-

(C) Under Public Utilities *Holding Company* Act of 1935 (15 U. S. C. 79(x)).

(11) Orders of the United States Maritime Commission: Orders of the Commission under Shipping Act of 1916 (39 Stat. 737) and the Merchant Marine Act of 1936 (46 U. S. C. 1114), *except orders for the payment of money.*

(12) Orders of the Secretary of Agriculture as follows:

(A) Cease and desist orders under the Packers and Stockyards Act (7 U. S. C. 194).

(B) Orders *issued as Chairman of the Commodities Exchange Commission* suspending or revoking the privilege of trading in a contract market (7 U. S. C. 9).

(C) Cease and desist orders to prevent monopolizing or restraining trade and unduly enhancing prices of associations of producers of agricultural products (7 U. S. C. 292).

(D) *Orders as to rates, practices and discrimination in respect to stockyards. (7 U. S. C. 217; 28 U. S. C. 43-44, 45a, 47, 48).*

(E) *Orders under the Perishable Commodities Act. (7 U. S. C. 499k; 28 U. S. C. 43–48).*

(13) Cease and desist orders of the Board of Governors of the Federal Reserve System in respect to interlocking directorates and officers (15 U. S. C. 19, 21).

(14) Cease and desist orders of the Secretary of Commerce in respect to monopolization or restraint of trade in the fishing industry (15 U. S. C. 522).

(15) Orders of the Post Office Department requiring publications to be sent by freight (39 U. S. C. 576).

(16) Orders of the Federal Alcohol Administration in the Treasury Department: (*a*) In re denying application for or the revocation, suspension, or annulment of a basic permit (27 U. S. C. 204 (h)). (*b*) *Orders in re interlocking directorates, (27 U. S. C. 208).*

(N. B.—Italics indicate corrections or amendments suggested during the hearings of the Senate Judiciary Committee. This applies also to sections quoted in subsequent footnotes.)

In addition to the above, it is expected, the jurisdiction of the proposed court will extend to orders of the Federal Power Commission under the review provisions of the Natural Gas Act, Public No. 688, 75th Cong. 3rd Sess., and to orders of the Civil Aeronautics Authority under the review provisions of the Civil Aeronautics Act, Public No. 706, 75th Cong. 3rd Sess. Both statutes were enacted after the Logan Bill had been introduced. The object of Sec. 4 is to transfer to the proposed Court's jurisdiction, those orders which are now subject to statutory review by proceedings in the nature of appeal from administrative agencies, whether by direct petition to an appellate court or by a proceeding de novo in a court of general jurisdiction. The bill, however, does not contemplate disturbing the jurisdiction of such appellate review as is now exercised by the Court of Customs Appeals, nor the primary jurisdiction of the Customs Court nor of the district courts under the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 U. S. C. 901. In view of the many exceptions, the

tion. In some instances, the new tribunals served their purpose, the special problems disappeared, and the courts were abolished. At other times, the new problems became crystalized into definite rules of law which could be as easily administered by the courts of general jurisdiction, with which the special courts became consolidated.[4] A number of special courts have justified their exist-

draftsmen of the bill had to resort to the method of enumerating the agencies and orders to be reviewed rather than include them in a generalized statement of jurisdiction.

Subsection (c) of Sec. 4 transfers jurisdiction to the proposed court in the following language:

The court shall have exclusive jurisdiction to review on appeal all final orders and decisions of the following administrative authorities and tribunals which are now subject to review by the Federal courts as indicated in section (d) of this Act and such other jurisdiction as Congress may from time to time confer upon it. All such jurisdiction now vested in the United States circuit courts of appeals, the United States Court of Appeals for the District of Columbia, the United States district courts, and the United States District Court for the District of Columbia is hereby abolished as to all such orders and decisions becoming final *one hundred and eighty* days after the effective date of the passage of this Act.

[4] See Holdsworth: History of English Law, Vol. I. It is within the process of history for courts to come and go. From the earliest days of English history to the present, new courts with new judicial procedures have sprung into being, to take care of the constant growth and changes in the social order. The great majority of these courts trace their origin to the middle ages and have their roots deep in antiquity. A casual look at their names will recall officials and tribunals which have survived during the ages, while others have been absorbed into the great body of the law and their indentity lost in newer institutions.

Before judicial institutions became centralized into one coordinated system, justice in England, like other functions of the government, was administered by local courts. Holdsworth tells us of a great variety of these local tribunals, of which the earliest, perhaps, were the communal courts. These consisted of the sheriff's courts and the coroner's court. The sheriff's court dates back to the 12th century, and as the name implies, revolves around the office and duties of the county sheriff. He was one of the most powerful officials of the time, being at once in control of the king's revenue, police, military force, etc., and he had the power of arrest. He also executed the writs of the court, a function which still survives. In addition to presiding over his court, he also held the hundred court (derived from a geographical area) and the county court (not to be confused with the modern 19th century county court), which at that time was a small Parliament exercising legislative, executive and judicial functions for the community. As the powers of the sheriff were taken from him, his court began to decline, and at the end of the 13th century, the judicial powers of the local courts were gradually assumed by the itinerant justices and the common law courts. The county and hundred courts, exercising a civil jurisdiction, ceased to exist as courts for litigation. The criminal jurisdiction was exercised by the Sheriff's Tourn, an institution fixed by the Magna Carta, which was a distinct court. The statute of 1461 marked its decline, and practically abolished it, jurisdiction having been taken over by the

ence as separate tribunals, and have become a permanent part of

justices of the peace. By the beginning of the 17th century it was obsolete, and was totally abolished by the Sheriff's Act of 1887.

The coroner's court, the second old communal court dating back to the year 1194, was centered around the functions of the coroner, an official established to check the growing power of the sheriffs. The coroner acted in certain cases for the sheriff, was in charge of the administration of criminal laws, such as arresting offenders, etc., but his chief duty, which still survives, was to impanel a jury and hold a court in cases of unexplained death. The Act of 1885 abolished his jurisdiction in criminal cases.

The second important group of local courts, established to meet specialized needs, were the private or franchise courts, which came about from the fact that the authority of the state was divided among those who received the rights or franchise in the soil of the state. These great franchise interests were permitted to have their own courts to adjudicate their special problems. Holdsworth divides the franchises into five principal classes: (1) The royal forests; (2) the landowners; (3) the Boroughs; (4) The Stannaries and (5) the Universities. Each of these powerful franchise holders had their own laws, customs, and courts, which for centuries controlled their jurisdictions, outside the common law, and the common law courts.

There was great rivalry, however, between the two judicial systems, and the franchise courts were gradually abolished and assimilated with the common law tribunals. Beginning with 1565 the common law courts began to take jurisdiction of cases involving the forest laws. With the abolition of the forest laws, the special courts decayed and became obsolete.

The landowners' courts were established in conjunction with the great palatinates, those independent principalities like Durham, Lancaster, Chester and Wales, where the law of England did not apply. Some of these independent tribunals were abolished with the abolition of the palatinates, while others were reorganized and regulated under the Common Law Procedure Acts, or were merged with the High Courts of Justice, under the Judicature Act of 1873. Some were abolished when they attempted to interfere with the mighty arm of the Star Chamber tribunal. In Wales, the English and Welsh systems were assimilated giving to the "Welshman a system of local courts, and probably a cheaper justice than would be had at Westminister." Holdsworth, op. cit., p. 132.

The Borough Courts date from the 13th century and owe their origin to a right in the borough charter to hold a court. These courts were sometimes held by the lord of the manor, and like the ancient county courts, were governing bodies, exercising all functions of government. They, too, disappeared with the growing powers of the justices of the peace and the popularity of the common law courts, which had constantly hampered their jurisdiction by the issuance of the prerogative writs. By 1800, the Borough Courts had practically disappeared, although the Municipal Corporations Act of 1835 provided for a scheme of reform of some borough courts, which had the right to hold quarter sessions.

The courts of the Stannaries were maintained by the mining interests, who had received franchises from earliest times. Here, too, difficulties arose as to conflict of jurisdiction with the general common law courts, and in 1836, a statute was passed consolidating some of these special courts and allowing appeals to the Judicial Committee of the Privy Council and the House of Lords. The court of appeals for the Stannaries, which was called the Court of the Lord Warden, was

merged with the Court of Appeals of England under the Judicature Act and the Court of the Vice Warden was abolished in 1896 and its duties conferred upon the newly created county courts.

The last of the franchise courts dealt with the privileges accorded the professions, especially the universities. The courts of the universities date to 1244, and they had jurisdiction over all persons and property affecting the universities. The procedure in use was both canon and secular. During the 19th century, these special courts gradually lost their jurisdiction. At first, they were deprived of cases involving morals of laymen; and in 1858 they lost jurisdiction over testamentary matters, while in 1879 they were deprived of jurisdiction in criminal cases. Today they are obsolete.

The feudal and manorial courts are the third great group of courts, which have come and gone with the great social changes in society. These, of course, were the appendages of the landowning classes. Like most of the local courts of their time, they performed both administrative and judicial functions, and were like the communal courts, already referred to. Their obsolete procedure, likewise, contributed to their decadence in the 18th century, and their duties also passed to the courts of common law.

There are other examples of special courts in English history, established for specific needs, which were finally abandoned or merged into the general judicial system, when they no longer served the purpose for which they were created. The Court of the Exchequer had a long history dating from the end of the 13th Century. It was limited to revenue cases, but it had both common law and equity jurisdiction. The latter was transferred to the Court of Chancery in 1842, and was finally merged with the High Court of Justice under the Judicature Act of 1873.

Another special court well known to American students of English history was the Court of the Star Chamber, which was established in 1487, primarily to deal with the chaotic conditions of the times, and as a means of restoring law and order. It had extraordinary powers in political criminal cases, and its tyrannical proceedings in these cases made it odious. During the period of its rise, similar courts flourished throughout the country, such as the Court of Requests, which supplemented and assisted the Star Chamber. After Parliament won in its struggle with the King, both courts were abolished in 1641. The equity jurisdiction of the Court of Requests was transferred to the Court of Chancery; and it was enacted that no court like the Star Chamber should ever be reestablished.

There were also a host of courts dealing with the specialized problem of the law merchant, a system of jurisprudence different and apart from the common law. The earliest of these were the Maritime Courts, dating back to the Middle Ages. They were local tribunals, usually situated in the seaport towns, which adjudicated and administered all questions of a maritime nature, including controversies growing out of actions for and against foreigners. The common law courts were in no position to supervise foreigners and they had no jurisdiction over contracts or torts performed abroad. The jurisdiction of these courts was gradually assumed by the Courts of Admiralty in the 16th century, into which they were eventually absorbed.

The commercial courts also administered the law merchant. Among these were the Courts of the Fairs and Boroughs (the famous Piepowder Courts) dating to the 15th century, which dealt chiefly with the laws of domestic trade. An act of 1477 restricted their jurisdiction. Litigants began to transfer their cases to the common law courts, and these courts, too, became absorbed in the common law system. Just

our judicial system,[5] as, for example, the Court of Claims and the Customs Court. The Court of Claims, created in 1855,[6] for the purpose of adjudicating claims against the United States aris-

as the Piepowder Courts dealt with domestic trade, so the Court of the Staple concerned itself with laws of foreign trade. This court owes its origin to the Staple Towns organized for the purpose of promoting foreign trade. Eventually, they too were absorbed by the courts of admiralty.

The last great type of special tribunals were the ecclesiastical courts, which administered the ecclesiastical laws. These grew in power with the rising power of the Church, and had jurisdiction not only in such strictly ecclesiastical matters as heresy, schism, nonconformity, etc., but in all cases of matrimony, divorce, testamentary problems and even of the censorship of the Press. Their decrees were enforced by the extraordinary writ of excommunication. The highest court, that of the Court of the High Commission, attained a position like that of the Star Chamber, which it closely resembled, and it too, was abolished in 1641. Statutes since then have further diminished the power of these courts, and by 1813, enforcement through excommunication was abolished. Jurisdiction in probate and divorce has been transferred to a division of the High Court of Justice under the Judicature Act, and today it is limited to strictly ecclesiastical problems.

In closing, we might also mention a court which served its purpose and was abolished, that of the Court of the Constable and the Marshal. These courts dealt with the discipline of the army and cases of slander against the nobility, punishment for which was very severe. The courts also had charge of prisoners of war. They fell into desuetude in 1689, with the establishment of the courts martial, and because of the severity of their decrees, their jurisdiction in slander cases was taken away from them by the Long Parliament.

[5] No one, I suppose, will say that juvenile courts, which are comparatively new in our history, were improvidently established or that they should be consolidated with the old courts. There is a separate and distinct problem with which these courts must deal. Unlike the criminal courts, whose main task is to enforce the law by punishing offenders, the object of the juvenile courts is to correct the tendencies of youthful offenders and develop them into law abiding citizens.

So rapid has been the rise of the juvenile court idea, that by 1928, only two states, Wyoming and Maine, did not provide for these special childrens' courts, but even here, provision has been made to hear cases involving juveniles, separately from other cases. To a lesser degree, the movement for the establishment of domestic relations or family courts is rapidly spreading. Here also the problems are not the same as those of the general courts of equity. The equitable distribution of property may be only a minor question in the dissolution of the family, where the domestic relations court judge must concern himself with human relations, either apart from or interwoven with questions of property rights. There is a movement, however, to consolidate the childrens' courts and the domestic relations court into one family court, with separate divisions for cases concerning children. Such is the Family Court Act for the City of New York, enacted October 1, 1933. See also W. F. Willoughby: Principles of Judicial Administration (1929) Ch. 24; and the report of the Children's Bureau, No. 193 (1937) Department of Labor, Washington, D. C.

[6] R. S. 1049, 28 U. S. C. 241.

ing under contract and under the Federal Constitution and statutes, has now functioned for over eighty years, and there is no suggestion that it be abolished and its work consolidated with the courts of general jurisdiction. Obviously, suits against the Government are essentially different from private conflicts, and should be treated by a court specialized in such problems. The Customs Court, established in 1922[7] to deal with the applications of the Tariff Laws, is an even more striking example. The judges there have become so specialized and expert in their peculiar problems, that in one year, 1936, they were able to dispose of some 71,492 cases.[8] It is important to remember that this efficiency is to a large extent the result of expertness obtained through the handling of similarly related problems.

We are now in the midst of an era of increasing federal governmental activity in the economic life of the nation. With the expansion of this activity, a great increase in administrative problems and a host of difficulties pertaining to the duties and powers of governmental officers must inevitably follow. The common law procedure of the courts of general jurisdiction is not always adaptable to controversies between private persons and the agencies of government. New procedure must be

[7] 44 Stat. 669, 19 U. S. C. 405a, changing the name of the "Board of General Appraisers" established by the Tariff Act of 1922, 42 Stat. 972, 19 U. S. C. 405.

[8] Report of the Attorney General, 1936, pp. 117, 157. During this year, the district courts disposed of 141,167 cases. This makes an average of approximately 910 cases for each district judge per year, there having been 155 district judges, as compared with an average of approximately 8,000 cases for each judge of the Customs Court. This is no reflection on the efficiency of our district judges. The cases in the district courts are more complicated than those in the Customs Court. The difference is attributable, to a large extent, to the fact that the Customs Court deals with a specialized problem and adapts its procedure in such a systematic manner that by far less time and effort are required for the disposition of the issues involved.

The efficiency of the Court of Claims, resulting from this specialization can best be compared with the work of the Circuit Court of Appeals and the U. S. Court of Appeals for the District of Columbia. Though the Court of Claims is one of original jurisdiction and consists of five judges who act as a single court, for all practical purposes, it is really acting in an apppellate capacity, because the testimony is taken before commissioners. During the fiscal year, 1936, the total number of cases disposed of by the Circuit Court of Appeals and the U. S. Court of Appeals for the District of Columbia was 3,526. Some of the Circuit Courts of Appeals have more than three judges, but they sit in panels of three. The average number of cases disposed of by each panel during that year was 235. On the other hand, the Court of Claims specializing in suits against the United States, disposed of 473, or twice as many cases during the same year

evolved, and the law pertaining to the limits of governmental action should be unified and systematized by judges with expert and special knowledge of the problems of public law. This is the *raison d'etre* of the Logan Bill.

Even with this important purpose, there is no need of establishing a new tribunal, if the present methods of judicial review are satisfactory. It therefore becomes necessary to examine the present situation in judicial review and enforcement of administrative action.

I. THE PRESENT SITUATION

The present methods of judicial review may be roughly grouped into two types: (A) review without statutory provision, and (B) review authorized and prescribed by statute.

(A) Review Without Statutory Provision

Without statutory provision for judicial review of administrative action, the validity of administrative orders and decisions is subject to review mainly in proceedings for civil or criminal enforcement.[9] If a person fails or refuses to obey a law or regulation, he may be enjoined or subjected to prosecution, or, if he fails to pay a tax, proceedings may be instituted against him or his property to enforce the liability. In these proceedings, all defenses, as to the validity of the law or regulation, are available to him. If the law or regulation is held valid, however, he is subjected to the requirements and penalties of the law. The person challenging governmental authority has to take a chance and pay heavily, if he guesses wrong.

If a person is injured through unauthorized governmental action, he has a common law remedy against the officer in his personal capacity. This remedy, however, has always been beset with difficulties. From earliest times, the courts have wrought an exception in favor of judicial officers,[10] which has been extended to protect many other officers, acting in a quasi-judicial capacity.[11]

[9] For other methods of judicial review over administrative action at common law, see Dickinson, John: Administrative Justice and the Supremacy of Law (1927) Ch. 3, p. 39 et. seq.

[10] Floyd v. Barker, 12 Coke Rep. 23, 25. Mastyn v. Fabriggs (1774), Cooper, 161, 172. See also In re Sawyer, 124 U. S. 200 (1888).

[11] Yaselli v. Goff, 275 U. S. 503 (1927). See also Dickinson, op. cit., pp. 44 et. seq.

It has long been felt that if a private person is accorded the right to question the validity of governmental action, he should have a remedy by way of ascertaining that validity before the requirements or penalties of the law are applied to him. This is the logical reason for suits against government officers to enjoin the enforcement of statutes and administrative orders until their validity has been judicially determined. The interference of equity courts in such cases, however, has also been beset with difficulties. Ordinary equity procedure does not permit wholesale interference with the operation of law. A court of equity should not enjoin the enforcement of criminal statutes,[12] and, aside from statutory limitations,[13] equity should not enjoin the collection of a tax, if there is an adequate remedy at law, by paying the tax and bringing action to recover it.[14]

These self-imposed limitations of equity courts are only minor difficulties. There are two fundamental difficulties. Suits to enjoin governmental action come in conflict with the fundamental constitutional principle of the separation of powers. Our Constitution postulates the division of government into three parts, each supreme within its sphere.[15] Therefore the judiciary should not undertake to pass on the validity of the governmental action of the other branches. This obstacle to equity suits against government officers has been removed to some extent by the interpretation of the judicial power as extending to the determination whether any governmental action is in accord with the dictates of the higher law.[16]

The second fundamental difficulty is that suits to enjoin governmental action are in conflict with the common law rule against the suability of the sovereign without express consent.[17] Since the sovereign acts through agencies of government, im-

[12] The leading case is In re Sawyer, 124 U. S. 200, 210, (1888), and see cases cited therein.

[13] E. g. Sec. 3224 R. S., 26 U. S. C. 1543.

[14] Stratton v. St. Louis, Southwestern Ry. Co., 284 U. S. 530 (1932), and Matthews, et al. v. Rodgers, 284 U. S. 521 (1932).

[15] Massachusetts v. Mellon, 262 U. S. 447, 488 (1923).

[16] Jones v. Securities & Exchange Commission, 298 U. S. 1, 24, 27 (1936); Butler v. United States, 297 U. S. 1, 62 (1936).

[17] See Principality of Monaco v. Mississippi, 292 U. S. 313 (1934), and cases cited therein, for a discussion of the doctrine of the nonsuability of sovereigns and for English and American authorities on the subject.

munity from suit attaches also to its agencies.[18] To circumvent the rule, it became necessary to resort to legal fictions, in order to bring the suit within the jurisdiction of a court of equity. The plaintiff must allege that the suit is brought against the officer, not in his representative, but in his individual capacity, and that acting under the color of his office, but without authority of law, he is threatening or attempting to inflict irreparable harm upon the plaintiff.[19] Upon pleading these magic words, the distinction between a suit against an individual and one against the government thus vanishes, and the court proceeds to pass on and determine the validity of the action of another branch of the government. If the defendant denies the allegation of threat,[20] or the immediacy of governmental action,[21] or the allegation of irreparable injury,[22] such defenses are regarded with disfavor. The main concern of the court is the validity of the governmental action.[23]

The Logan Bill is not concerned with review of governmental action resulting from suits brought without express statutory authority.[24] It does not affect suits against officers for a redress

[18] See Kawananakoa v. Polyblank, 205 U. S. 349 (1907), for the theory that a sovereign is exempt from suit, and the doctrine is not confined to powers that are sovereign in the full sense of juridical theory, but is extended to those which in actual administration originate and change at their will the law of contract and property from which persons within the jurisdiction derive their rights.

[19] Ex parte Young, 209 U. S. 123, 157, 158 (1908).

[20] Hart Coal Corp. v. Sparks, 9 F. Supp. 825, 830 (1935); also compare Ex Parte La Prade, 289 U. S. 444, 458 (1933).

[21] James M. Landis, Chairman, etc. v. North American Co. and American Water Works and Electric Co., Inc., 299 U. S. 248 (1936). Here, the Attorney General sought to stay proceedings of a number of suits brought by public utility holding companies in the courts of the District of Columbia, challenging the validity of the Securities and Exchange Act, until the question was decided in the Electric Bond and Share Company Case, then pending in the federal district court in the second circuit. The Attorney General declared that he would not enforce the provisions of the act until the Supreme Court had passed on the validity of the S. E. C. Act in the Electric Bond case. The Supreme Court of the District of Columbia granted the stay, the Court of Appeals reversed, and the Supreme Court reversed the Court of Appeals, holding, however, that the trial court had gone too far in the granting of the stay. See also Pierce v. Society of Sisters, 268 U. S. 510, 536-7 (1925).

[22] Alabama Power Co. v. Ickes, 302 U. S. 464 (1937).

[23] Carter v. Carter Coal Co., 298 U. S. 238 (1936).

[24] Subsections (a) and (b) of Sec. 4 provides:

(a) The jurisdiction of the court shall extend to those cases hereinafter enumerated in subsection (d) hereof in which there is a dispute between *the* administrative authority and an individual

of wrongs. Indirectly, the bill would eliminate suits in equity to enjoin governmental action, insofar as it provides an adequate remedy at law to determine the validity of administrative orders.

(B) Statutory Review

The above difficulties encountered in suits against government officers, whether in law or in equity, are obviated when there is express statutory authority to bring action. With the 1906 amendments to the Interstate Commerce Act,[25] provision was made for suits to enjoin orders of the Interstate Commerce Commission. With the extension of governmental activity and the establishment of new agencies, Congress has by statute provided for direct judicial review of governmental action. These provisions came about from time to time, with reference to specific agencies, but without any effort to systematize the entire procedure of judicial review and enforcement. At present, most agencies act without being subject to statutory judicial review.[26] Some agencies are subject to review by the ordinary district courts;[27] others by specially constituted district courts;[28] still

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or individuals, or between the administrative authority and a corporation or corporations, but it shall not extend to cases when there is a dispute between individuals or private corporations, or between an individual or individuals and a private corporation or corporations, arising out of administrative action.

(b) Preliminary to any right to a review on appeal by this court of any administrative decision or any order of an administrative authority or tribunal—

(1) the order or decision appealed from must have become a final order or decision of the authority or tribunal issuing or promulgating it.

(2) the parties affected by such order or decision must have had notice and an opportunity to be heard and present evidence including the testimony of witnesses at a hearing.

(3) there must be a record of the proceedings before such authority or tribunal.

(4) there must be a statutory right either to a review of such final order or decision by a United States court or to proceed de novo before a United States court.

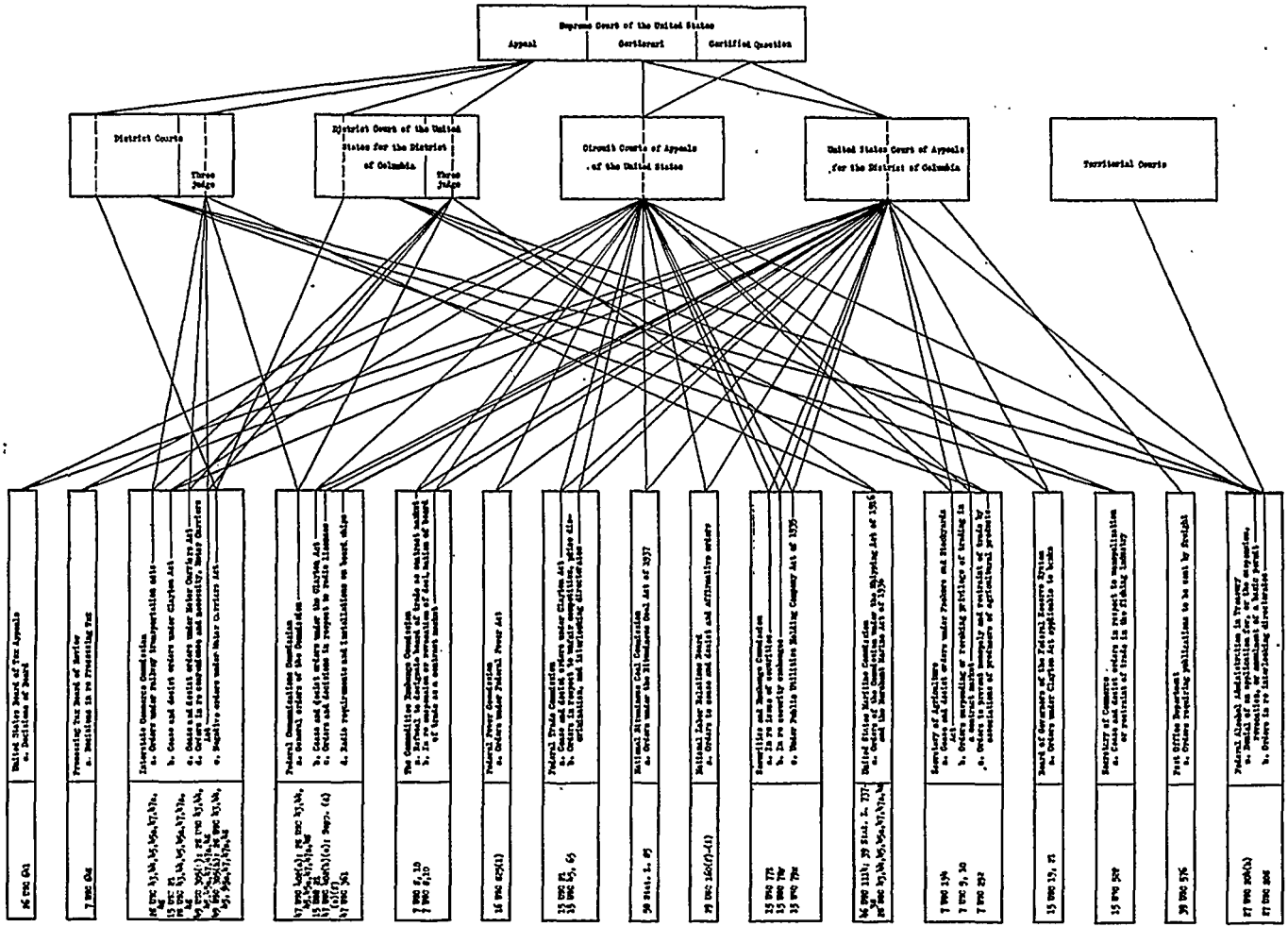
[25] 34 Stat. 592.

[26] See Blachly, Frederick F. "Working Papers on Administrative Adjudication" (1938). Government Printing Office. Printed for the use of the Senate Judiciary Committee in connection with the hearings on S. 3676, 75th Cong. 3rd Sess.

[27] For example, the orders of the deputy Commissioners under the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 U. S. C. 901.

[28] For example, the rate orders of the Interstate Commerce Commission, 28 U. S. C. 43, 44, 45, 45a, 48.

EXHIBIT 1.—EXISTING SYSTEM OF STATUTORY JUDICIAL REVIEW OF ADMINISTRATIVE ORDERS AND DECISIONS INCLUDED IN S. 3676, 75TH CONGRESS, 3D SESSION



others by special courts;[29] in some instances by appellate courts acting in an administrative capacity;[30] and still others by the Circuit Court of Appeals.[31]

Since the primary purpose of the Logan Bill is to simplify and systematize judicial review over administrative action, it would be interesting if we could analyze the present situation in respect of some 125 agencies[32] of the Federal Government. That, however, would take us far beyond the scope of the Logan Bill, which limits review to 16 Federal agencies, and will undoubtedly include such new agencies as the Civil Aeronautics Authority whose orders are made subject to review by the Circuit Court of Appeals.[33] Our analysis will therefore be limited to these agencies. In order to save considerable space and to take advantage of a graphic presentation, the statutory provisions for judicial review will not be discussed in detail, but the reader will be referred to a chart, submitted at the Hearings before the Senate Judiciary Committee, and reproduced on the opposite page.[34]

Complicated as this chart is, it does not completely show the actual situation. If the authors had attempted to show all the variations of judicial review as reflected in the statutes and decisions, relating to the sixteen administrative agencies, they would have felt it well nigh impossible to present all the data in a two-dimensional chart and by means of lines of the same character. The variations might have been represented by lines of various thicknesses, by solid lines, dotted lines, and lines of microscopic question marks to indicate, that with all the knowledge we possess, there is still some doubt as to the correctness of the assertion, but then the chart itself would have been too complicated to be of use.

I shall attempt to point out only some complications which could not have been made apparent on the chart and which

[29] For example, the appraisals of the Collector of the Port are reviewed by the Customs Court.

[30] For example, the decisions of the Commissioner of Patents are reviewed by the Court of Customs and Patent Appeals.

[31] The orders of the Federal Trade Commission, Federal Power Commission, National Labor Relations Board and other agencies are reviewed by the Circuit Court of Appeals.

[32] See note No. 26 supra.

[33] Sec. 1006(a) Public No. 706, 75th Cong. 3rd Sess.

[34] The charts used in this article were introduced at the hearings of the Senate Judiciary Committee by Mr. J. Emmet Sebree of the Board of Tax Appeals, and had been prepared by Mr. Sebree and by Dr. Frederick F. Blachly, of the Brookings Institution of Washington.

relate to (a) the types of orders subject to review, (b) the reviewing courts, (c) the scope of review, and (d) the problem of conflicts.

(a) Types of Orders Subject to Review

From the chart it would appear that all orders of the specified administrative agencies are equally subject to judicial review. The statutory provisions, however, differ materially. The statutes authorizing review of the determination of the Board of Tax Appeals[35] and of the Processing Tax Board[36] speak not of orders, but of decisions; other statutes refer to orders;[37] still others, to orders or requirements.[38] Differences between orders, requirements, or decisions would be difficult to present graphically. Nevertheless, the differences are important. When the Board of Tax Appeals reviews a tax liability determined by the Commissioner of Internal Revenue, it does not order the taxpayer to pay the tax; or, if the decision is in favor of the taxpayer, it does not prohibit the Commissioner from collecting the tax. The decision of the Board of Tax Appeals would appear to be more akin to a valuation order of the Interstate Commerce Commission[39] or still more closely related to a determination by the Interstate Commerce Commission that a given carrier is not an interurban electric railway exempt from the provisions of the Railway Labor Act;[40] or to a finding by the Federal Power Commission that a proposed dam and hydroelectric plant on a stream will affect the interests of interstate or foreign commerce.[41] The decisions of the Board of Tax Appeals, the Interstate Commerce Commission, or the Federal Power Commission do not require anyone to do or to refrain from doing anything, but merely fix the legal status and invoke the operation of the statute.

These determinations of the Interstate Commerce Commission or the Federal Power Commission are not subject to direct judicial review, and were not intended to be represented by the

[35] 44 Stat. 110; 48 Stat. 926; 26 U. S. C. 641.

[36] 49 Stat. 1748. 7 U. S. C. 648.

[37] For example, the Federal Trade Commission Act, 15 U. S. C. 45.

[38] For example, See Urgent Deficiencies Act, 38 Stat. 220; 28 U. S. C. 45a.

[39] United States v. Los Angeles & Salt Lake R. R. Co., 273 U. S. 299 (1927).

[40] Shannahan v. United States, 303 U. S. 596 (1938).

[41] Carolina Aluminum Co. v. Federal Power Commission, 97 F. (2d) 435 (1938).

lines appearing on the chart. The decisions of the Board of Tax Appeals and the Processing Tax Board, however, are subject to review by the Circuit Court of Appeals, and then, through certiorari or certification, by the Supreme Court.

If we apply the same rules of law which prompted the decisions that the rulings of the Interstate Commerce Commission and the Federal Power Commission are not subject to review, it should also follow that the decisions of the Board of Tax Appeals and of the Processing Tax Board are not subject to direct judicial review. There is a difference, however, which may be said to justify the distinction. The proceedings before the Board of Tax Appeals and the Processing Tax Board are adversary as between the Commissioner of Internal Revenue and the taxpayer. Upon the redetermination of the tax liability by the Board of Tax Appeals, a petition for review, filed by the taxpayer in the Circuit Court of Appeals, may be said to be a statutory equivalent for a suit to enjoin the Commissioner from collecting the tax so determined; and a petition for review filed by the Commissioner may be said to be a statutory equivalent for a suit to enforce what he deems to be the tax liability.[42]

Another complication arises out of the differences in the statutory provisions as to whether only final orders are subject to review. The National Labor Relations Act[43] provides for review of any *final order* of the National Labor Relations Board. This has been held to preclude injunctive relief by a district court against an order of a board initiating a proceeding.[44] But a like result was reached by the Supreme Court in a suit to set aside a similar order of the Interstate Commerce Commission,[45] despite the fact that under the Urgent Deficiencies Act,[46] a review may be had of *any order* of the Commission, other than an order for the payment of money. Statutes like the Federal Trade Commission Act,[47] which provide for review of orders have been interpreted by the Eighth Circuit,[48] as precluding review of an

[42] Comp. Old Colony Trust Co. v. Commissioner Internal Revenue, 279 U. S. 716, 722-728 (1929).
[43] 49 Stat. 449; 29 U. S. C. 166, f-i.
[44] Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41 (1938).
[45] United States v. Illinois Central R. R. Co., 244 U. S. 82 (1917).
[46] 38 Stat. 219; 28 U. S. C. 43.
[47] 38 Stat. 719; 15 U. S. C. 45.
[48] Minneapolis Chamber of Commerce v. Federal Trade Commission, 280 F. 45 (1922).

initiating order under the "All Writs Section" of the Judicial Code.[49] Sixteen years later, a different conclusion was reached by the Third Circuit,[50] but that decision was finally reversed by the Supreme Court.[51] And the Fourth Circuit held that a provision, authorizing a review of an administrative order, like that in the Federal Trade Commission Act, precluded review of an order, which, though final as to that particular administrative agency, left some further administrative action to be taken by another administrative agency.[52] But query: Suppose the Interstate Commerce Commission should issue a rate order on the transportation of coal, to take effect upon certain action of the Bituminous Coal Commission. Would such an order be subject to review under the Urgent Deficiencies Act before the Coal Commission has acted? The Supreme Court has never expressly ruled that only final orders of administrative agencies are subject to review. It is arguable that only final orders are reviewable as a corollary to the requirement that all administrative remedies must be exhausted. But then there is still left the question whether failure to exhaust administrative remedies goes to the jurisdiction of the court,[53] or merely means that ordinarily it would be an abuse of judicial discretion for a court to exercise its power before all administrative remedies have been exhausted.[54]

Another class of orders of the Interstate Commerce Commission which have been held to be not reviewable under the Urgent Deficiencies Act are what are known as "negative orders", that is, orders which merely deny relief from the operation of the statute, like the refusal to grant a certificate of public convenience and necessity.[55] Various reasons have been assigned by the Supreme Court why negative orders are not subject to review under the Urgent Deficiencies Act, but the most persuasive

[49] Sec. 262 Judicial Code, 28 U. S. C. 377.

[50] Metropolitan Edison Co. v. Federal Power Commission, 94 F. (2d) 943 (1938).

[51] Federal Power Commission v. Metropolitan Edison Co., 304 U. S. 375 (1938).

[52] Ames-Baldwin-Wyoming Corp. v. National Labor Relations Board, 73 F. (2d) 489 (1934).

[53] Porter v. Investors' Syndicate, 286 U. S. 461 (1932).

[54] Atlantic Coast Line R. R. v. Prentis, 211 U. S. 210 (1908); see also Lawrence v. St. Louis-San Fr. R. R. Co., 278 U. S. 228 (1929).

[55] Piedmont & Northern R. R. Co. v. United States, 280 U. S. 469 (1930).

reason appears as a dictum in the Chicago Junction Case,[56] where Justice Brandeis pointed out that in order to enter an effective judicial review in such negative order cases, it would be necessary for the courts to take over the administrative functions of the Commission. This reasoning was followed in a recent decision of the Second Circuit, holding that an order of the Federal Power Commission, denying an application for a merger of two electric power companies, was not subject to review by the Circuit Court of Appeals[57] under section 313 of the Federal Power Act.

So much for the similarity between the non-reviewability of negative orders under the Urgent Deficiencies Act and under section 313 of the Federal Power Act. But what about the orders of the National Labor Relations Board, as to which the act provides that orders *granting or denying relief* should be subject to review? It may be argued that the Act contemplates review only of those orders *denying* relief which are affirmative in character. We have had orders of the Interstate Commerce Commission, which though negative in form, were held to be affirmative in effect.[58] If that is so, how are we going to distinguish the above statutes from the provision in the Civil Aeronautics Act, which provides for review of all orders, *affirmative or negative?*[59]

The above are but a few illustrations of the complications in judicial review from the standpoint of the orders rendered. Let us now turn to the complications from the standpoint of the reviewing court.

(b) The Reviewing Courts

In most instances, the reviewing tribunal is clearly indicated in the statute. For example, the orders of the Federal Trade Commission, Federal Power Commission, Securities and Exchange Commission, National Labor Relations Board are subject to review by the Circuit Court of Appeals. But in other instances, the law is not so clear. For example, the chart makes

[56] 264 U. S. 258, 264 (1924).

[57] Newport Electric Corporation v. Federal Power Commission 97 F. (2d) 580 (1938). But more recently the ninth circuit held otherwise. Pacific Power & Light Co. v. Federal Power Comm'n (not yet reported).

[58] Intermountain Rate Cases, 234 U. S. 476 (1914); Alton R. R. v. United States, 287 U. S. 229 (1932).

[59] Sec. 1006, Public No. 706, 75th Cong. 3rd Sess.

it appear that all general orders of the Interstate Commerce Commission are subject to review by a three-judge court—with a direct appeal to the Supreme Court; similarly, with the rate orders under the Packers and Stockyards Act, the general orders of the Federal Communications Commission, the United States Maritime Commission, etc. But the statutes authorizing review of these orders, like the provision authorizing suits to enjoin the enforcement of state statutes,[60] merely provide that suit may be brought in the district courts. It is only when the plaintiff seeks an interlocutory injunction, that the statute requires a court of three judges to be convened, from which an appeal may be taken to the Supreme Court. If, however, no interlocutory injunction is prayed for, or if originally was prayed for, and then abandoned, the issues may be determined by a one-judge district court and an appeal taken to the Circuit Court of Appeals.[61] There is one dictum in the Supreme Court which would lend comfort to the view that all general orders of the Interstate Commerce Commission are subject to review by a three-judge court.[62] Be that as it may, the chart gives no indication of any distinction as to when these orders may be reviewed by a one-judge court and when by a three-judge court.

In the above discussion concerning the non-reviewability of negative orders, I have stressed the point that such orders of the Interstate Commerce Commission were not subject to review under the Urgent Deficiencies Act, and that the orders of the Federal Power Commission were not subject to review under section 313 of the Federal Power Act. Does that mean that negative orders are not subject to review at all? If they are subject to review, then by what courts? In *United States* v. *Griffin*,[63] it was held that an order of the Interstate Commerce Commission, denying an increase in pay for the transportation of mail was a negative order, not subject to review under the Urgent Deficiencies Act, but that suit might be brought for just compensation in the Court of Claims. Would the suit proceed entirely *de novo* or would the determination of the Interstate Commerce Commission play a part in the proceedings in the Court of Claims? If the record made before the Interstate Commerce Commission is

[60] Sec. 266 Judicial Code, 28 U. S. C. 380.
[61] Ex Parte Hobbs, 280 U. S. 168, 172 (1929); Stratton v. St. Louis So. West. Ry. Co., 282 U. S. 10, 15 (1930).
[62] Powell v. United States, 300 U. S. 276, 284 (1937).
[63] 302 U. S. 226, 234, 238 (1938).

introduced in evidence, then there is an instance where the Court of Claims may review an order of the Interstate Commerce Commission.

Something should be said about the final review by the Supreme Court. No distinction appears on the chart between appeals from interlocutory and final decrees of the three-judge courts. Yet, as a basis for appeal from an interlocutory degree, it must be shown that the district court has abused its discretion in granting or denying relief, and without such showing, the Supreme Court will not go into the merits of the case.[64]

In all instances where the petition for review is filed in the Circuit Court of Appeals, the chart indicates, the decision of the Circuit Court of Appeals may be reviewed by the Supreme Court on certiorari or certification. Most statutes make such provision, but some, for example, the Federal Trade Commission Act, provide only for certiorari.[65] There has never been an instance where the Circuit Court of Appeals certified questions to the Supreme Court in a case arising under the Federal Trade Commission Act. Perhaps it may do so under Section 239 of the Judicial Code. But if we apply the maxim of *inclusio unius exclusio alterius,* it may equally be argued that certiorari is the only remedy.

There is no indication on the chart that an appeal may lie to the Supreme Court from the Circuit Court of Appeals. If, however, a decision or order of an administrative agency is sustained or set aside because the Circuit Court of Appeals deems a state statute in violation of the Federal Constitution, then the case may proceed to the Supreme Court on appeal.[66]

(c) Scope of Judicial Review

Having discussed the complexities in judicial review from the standpoint of the types of orders and of the reviewing courts, let us turn to the scope of review, which the courts exercise. There are differences in the statutory provisions as to the scope of review. Some differences are obliterated through judicial decisions, but others are created by judicial decisions, though they do not appear in the statutes.

[64] Rule 12 of Revised Rules of Supreme Court. See note in United States Code Annotated, 1938 Supplement; also Alabama v. United States, 279 U. S. 229 (1929).

[65] 38 Stat. 719; 15 U. S. C. 45.

[66] 43 Stat. 939, 28 U. S. C. 348.

The statutes are not uniform concerning the weight which may be attributed to the administrative findings as to facts. For example, neither the Interstate Commerce Act nor the statutes providing for review of the decisions of the Board of Tax Appeals or of the Processing Tax Board contains any provision as to the conclusiveness of their findings as to facts. On the other hand, the Federal Trade Commission Act[67] and the Clayton Act[68] provide that the findings of their administering agencies, if supported *by testimony,* shall be conclusive. Other statutes provide that the findings of the administrative agencies as to facts shall be conclusive, if supported *by substantial evidence,*[69] and still others that the findings shall be conclusive, if supported *by the weight of evidence.*[70]

Some of the differences disappear when we consider the law as reflected in the decisions of the Supreme Court. Although, as has been indicated, there is no provision as to the conclusiveness of the Interstate Commerce Commission's findings, the Supreme Court has promulgated the rule that those findings will be regarded as conclusive, if supported *by evidence* or *by substantial evidence.*[71] Although there is no provision on the conclusiveness of the findings as to the Board of Tax Appeals, the Supreme Court held that the Board's findings as to facts, if supported by *substantial evidence,* must be accepted as conclusive and that it is not permissible for the Circuit Court of Appeals to make findings of its own[72] The same rule has been applied to findings made by the Federal Trade Commission and other agencies.

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[67] See Note No. 37, supra.

[68] 38 Stat. 730; 15 U. S. C. 21.

[69] For example, See National Labor Relations Act, Securities and Exchange Act, Federal Power Act, etc.

[70] For example, the findings of the Commodities Exchange Commission, 7 U. S. C. 8, 42 Stat. 1001.

[71] See Sharfman, I. L.: The Interstate Commerce Commission, Part II, pp. 385 et seq. The Supreme Court has gone to the extent of holding that the findings of the Interstate Commerce Commission will be regarded as conclusive, if supported by "more than a scintilla of evidence". See Interstate Commerce Commission v. Illinois Central R. R. 215 U. S. 452, 470 (1910). The more recent cases, however, tend toward the proposition that the findings of the I. C. C. will be regarded as conclusive, if supported by "substantial" evidence. I. C. C. v. Louisville & Nashville R. R., 227 U. S. 88, 91 (1913); Florida East Coast Line v. United States, 234 U. S. 167 (1914).

[72] Helvering v. Rankin, 294 U. S. 700 (1935); General Utilities & Operating Co. v. Helvering, 296 U. S. 200, 206 (1935); Elmhurst Cemetery Co. v. Commissioner Internal Revenue, 300 U. S. 37 (1937).

Thus by judicial decisions, the general rule applicable to all of these administrative agencies has practically obliterated the differences contained in the statutes. The decisions have, however, created differences of their own. Whatever may be said of the general rule concerning the conclusiveness of administrative findings, there is no doubt that while the findings of the Interstate Commerce Commission are uniformly regarded as conclusive, if supported by evidence, the same uniform treatment has not been accorded the findings of the Federal Trade Commission.[73]

Still other differences have been introduced through judicial decisions in connection with the rule that, while the courts will not review the Commission's findings as to facts and will not substitute their judgments for those of the Commission, the courts will review their conclusions of law, and will exercise the same review over mixed questions of law and fact. And so the question often arises when is a fact a fact, when is it a question of law, and when is it a mixed question of law and fact? A finding by the Interstate Commerce Commission that a carrier is not an interurban electric railroad, *exempt from the provisions of the Railway Labor Act,* has been treated as a determination of fact.[74] But a finding by the Board of Tax Appeals, that a certain distribution of money made by a corporation to former employees constituted payments for past services rather than gifts, was treated by the Supreme Court as a mixed question of law and fact.[75] The determination of reasonable rates, or the discriminating character of practices, being a question of fact, has been held by the Supreme Court to be entirely within the province of the Interstate Commerce Commission.[76] But in passing on the question of what constitutes "unfair competition" within the mean-

[73] International Shoe Machinery Co. v. Federal Trade Commission, 280 U. S. 291, 303 et seq. (1930), where Justice Stone, in his dissenting opinion, pointed out that the Supreme Court weighed the evidence and substituted its own findings of fact for that of the Federal Trade Commission. See also the "doubting opinion" of Chief Justice Taft in Federal Trade Commission v. Curtis Publishing Co., 260 U. S. 568, 582 (1923).

[74] Shannahan v. United States, 303 U. S. 596 (1938).

[75] Bogardus v. Commissioner Internal Revenue, 302 U. S. 34, 58 S. C. 61. I. C. C. v. Delaware Lackawanna & Western R. R. Co., 220 U. S. 235, 251, 255 (1911).

[76] Baltimore & Ohio R. R. Co. v. Pitcairn, 215 U. S. 481, 493-5 (1910).

ing of the Federal Trade Commission Act, the Court held this was primarily one for the courts[77] to determine.

(d) Conflict of Decisions

The above complications were comparatively easy to demonstrate, because they can be detected by comparisons of statutes or by reference to specific cases. With review being exercised by some 85 district courts and 11 circuit courts of appeal, many conflicting decisions on the same problems of law are bound to arise, especially if there is an insufficient uniformity of approach toward review over administrative action. These conflicts hamper the work of the administrative agencies and, in addition, impose undue burdens on the litigants.

It is true, that where there is a conflict between two circuits as to the same subject matter, the Supreme Court will grant a writ of certiorari in order to resolve the conflict.[78] But the concept of a "conflict" in this respect is much too narrow for the purpose of effecting uniformity in the broad field of administrative law. The conflict of decisions among circuits, furnishing a ground for the grant of a writ of certiorari, refers to specific cases, and while there may be a conflict in the applications of the principles of law, certiorari will be denied, if the cases are distinguishable on the facts.

At times, a direct conflict between two circuits may arise simultaneously, but again, it may not arise for many years. In the meantime, the decision of one circuit is not authoritative in another. Cases continue to be brought to the Circuit Court of Appeals with the hope that a clear conflict might result. When that happens, the Supreme Court grants a writ of certiorari. The writ, however, is not granted to all aggrieved parties. The jurisdiction of the Court does not extend to grant relief to those who had lost out in previous terms of court. It is only the last litigant who thus profits by the losses of his predecessors.

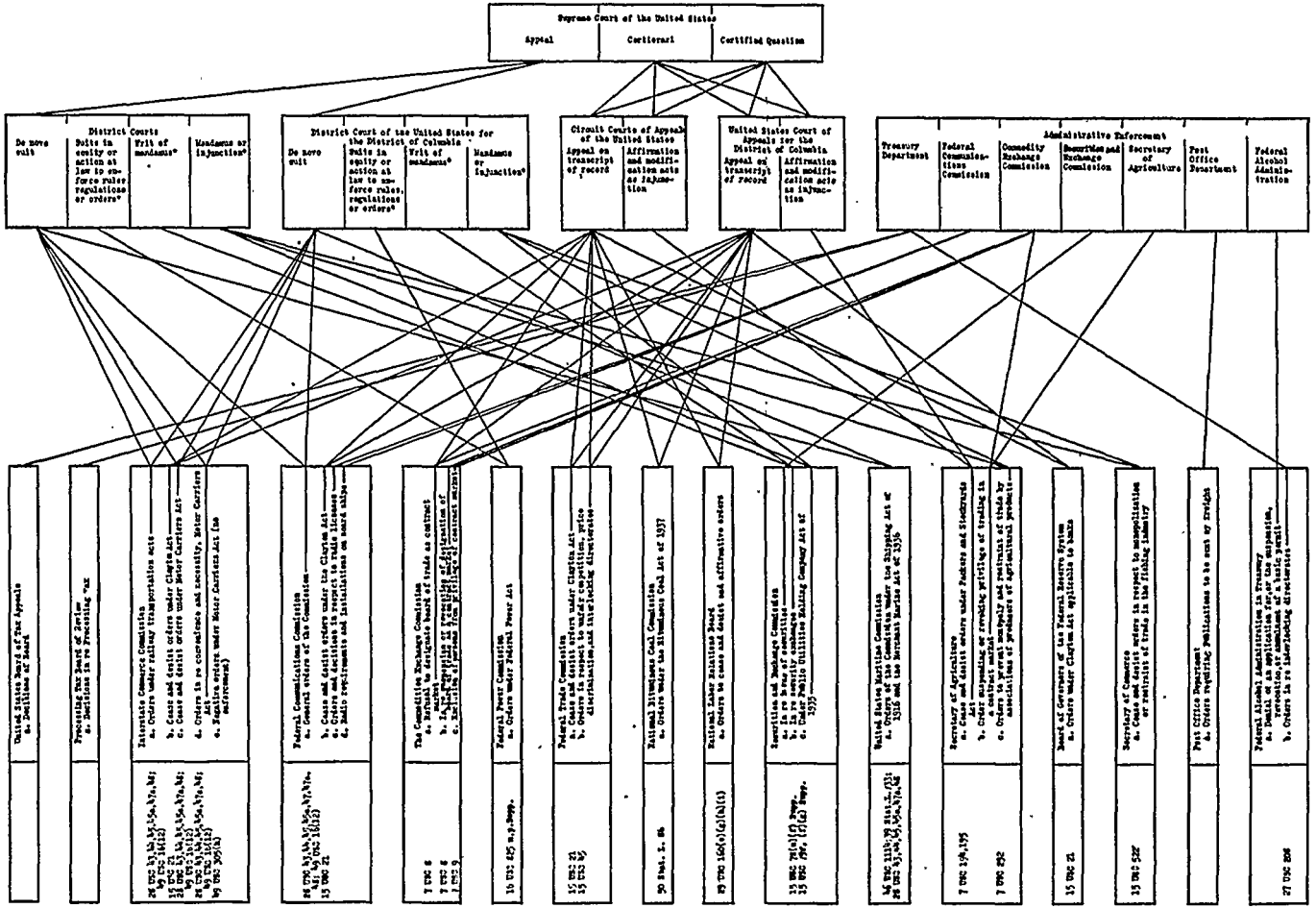
CIVIL ENFORCEMENT OF ADMINISTRATION ORDERS

So much for the present situation in the methods and results of reviewing administrative orders. One must not overlook the problems which center about the enforcement of orders. Review

[77] Federal Trade Commission v. Gratz, 253 U. S. 421 (1920).

[78] Rule No. 38, U. S. Supreme Court Rules.

EXHIBIT 2.—PRESENT METHOD OF ENFORCEMENT OF ADMINISTRATIVE DECISIONS AND ORDERS ENFORCEABLE UNDER S. 3676, 75TH CONGRESS, 3D SESSION



* Review by Circuit Courts of Appeals of the United States or United States Court of Appeals for the District of Columbia, 28 USC 225

and enforcement are often regarded as separate and distinct. But they are not, for with few exceptions, judicial enforcement always involves a review of the administrative order; and where the enforcement is administrative, it is subject to further judicial review. For a graphic presentation of the present methods of enforcement of administrative orders, we may adopt another chart presented at the Hearings before the Senate Judiciary Committee, reproduced on the next page.

The reader need not be burdened by stressing further complications on this aspect of the problem except to point out some of the differences in the statutory provisions.

The enforcement provisions found in the Clayton Act, the Federal Trade Commission Act (before the recent amendment by Public No. 447, 75th Cong. 3rd sess.), the National Labor Relations Act, National Bituminous Coal Conservation Act, are really not enforcement, but review provisions. Under these Acts, if the person against whom the order is issued does not choose to obey it, and does not seek to have the order reviewed by the Circuit Court of Appeals, the administrative agency, in effect, appeals against that person. It files its petition and transcript, and the case proceeds in the same manner, as if the respondent had petitioned for a review. If the court affirms the order of the Commission, it adopts that order as its own. Then, if the respondent disobeys, the process of enforcement takes place.[79]

In statutes like the Federal Power Act, the Securities and Exchange Act, etc., the procedure for enforcement is by way of suit in the district court, which holds a trial *de novo* on the order issued by the administrative agency. Upon evidence adduced and arguments presented, the district court renders its decree, which is subject to appeal to the Circuit Court of Appeals, whose judgment may be further reviewed by the Supreme Court.

The enforcement provisions under statutes like the Interstate Commerce Act, the Federal Communication Act, the Shipping Act of 1916, and the Merchant Marine Act of 1936, do not permit review of the orders, except on the question whether they had been regularly made and duly served. Having ascertained these facts, the only question open to the district court is whether the respondent has disobeyed the order.

[79] Federal Trade Commission v. Balme, 23 F. (2d) 615 (1928).

It is interesting to note that during the past two years, the National Labor Relations Board issued 321 orders; of these 65 orders went to the Circuit Court of Appeals on petitions for review, while the Board sought the enforcement of 79 orders. During the past 32 years, after the 1906 amendment of Sec. 16(12) of the Interstate Commerce Act,[80] the Interstate Commerce Commission had no occasion to enforce its orders. Before that time, section 16(12) related to "any lawful order or requirement, which of course, opened for review the question of the validity of the order. The 1906 amendment related to "any order" issued by the Commission, other than an order for the payment of money.

II. REVIEW AND ENFORCEMENT UNDER THE LOGAN BILL

Before we proceed with a discussion of the changes to be effected by the Logan Bill, it is well to define further the scope of the bill. It must be borne in mind, that the bill does not concern itself with disputes between private persons arising from the orders of administrative agencies,[81] but with controversies as between the administrative authorities and private persons. That is the reason why the reparation orders of the Interstate Commerce Commission were not included in the bill, and suits under the Longshoremen's and Harbor Workers' Compensation Act were also excluded, for while suits to set aside an award made under that act are brought against the Deputy Commissioner of the United States Employees Compensation Commission, the real party in interest is the claimant for compensation.

The Logan Bill does not attempt a sweeping change in the judicial review of all administrative orders. In the process of unifying and systematizing procedure, it is best to go slowly. The intention is that if the accomplishments realized by this legislation are as satisfactory as those attained by the Court of Claims, the Customs Court and the Court of Customs and Patent Appeals, then it may be advisable to extend the jurisdiction of the proposed court to orders and agencies not now covered.

The great immediate advantage of this measure, with reference to the enumerated administrative agencies, lies in the fact that their orders will be reviewed by one court, rather than by approximately 100 courts. All administrative agencies are now

[80] 34 Stat. 591.

[81] See Note No. 24, supra.

EXHIBIT I-A.—PROPOSED PLAN OF JUDICIAL REVIEW OF ADMINISTRATIVE ORDERS AND DECISIONS UNDER S. 3676, 75TH CONGRESS 3D SESSION

46 USC 641	United States Board of Tax Appeals a. Decisions of Board
7 USC 648	Processing Tax Board of Review a. Decisions in re Processing Tax
49 USC 3,13,15,15a,17,17a, 19 15 USC 21 49 USC 3,13,15,15a,17,17a, 19 49 USC 305(a); 49 USC 13,15, 15,15a,17,17a,19 49 USC 305(a); 49 USC 13,15, 15,15a,17,17a,19	Interstate Commerce Commission a. Orders under railway transportation acts b. Cease and desist orders under Clayton Act c. Cease and desist orders under Motor Carriers Act d. Orders in re consolidation and security, Motor Carriers Act e. Negative orders under Motor Carriers Act
47 USC 303(a); 26 USC 13,15, 15,15a,17,17a,19 15 USC 21 47 USC 303(b)(c); Supp.(4) (a)(f) 47 USC 361	Federal Communications Commission a. General orders of the Commission b. Cease and desist orders under the Clayton Act c. Orders and decisions in respect to radio licenses d. Radio requirements and installations on board ships
7 USC 2, 10 7 USC 2, 10	The Commodities Exchange Commission a. Refusal to designate board of trade as contract market b. In re suspension or revocation of designation of board of trade as a contract market
16 USC 825(1)	Federal Power Commission a. Orders under Federal Power Act
15 USC 21 15 USC 45,65	Federal Trade Commission a. Cease and desist orders under Clayton Act b. Orders in respect to unfair competition, price discrimination, and interlocking directorates
50 Stat. L. 85	National Bituminous Coal Commission a. Orders under the Bituminous Coal Act of 1937
29 USC 160(f)-(i)	National Labor Relations Board a. Orders to cease and desist and affirmative orders
15 USC 77i 15 USC 79y 15 USC 79z	Securities and Exchange Commission a. In re issue of securities b. In re security exchanges c. Under Public Utilities Holding Company Act of 1935
46 USC 1111; 39 Stat. L. 737-38 46 USC 13,15,15a,17,17a,19	United States Maritime Commission a. Orders of the Commission under the Shipping Act of 1916 and the Merchant Marine Act of 1936.
7 USC 15h 7 USC 9, 10 7 USC 292	Secretary of Agriculture a. Cease and desist orders under Packers and Stockyards Act b. Orders suspending or revoking privilege of trading in a contract market c. Orders to prevent monopoly and restraint of trade by associations of producers of agricultural products
15 USC 19,21	Board of Governors of the Federal Reserve System. a. Orders under Clayton Act applicable to banks
15 USC 530	Secretary of Commerce a. Cease and desist orders in respect to monopolization or restraint of trade in the fishing industry
39 USC 276	Post Office Department a. Orders requiring publications to be sent by freight
27 USC 204(h) 27 USC 206	Federal Alcohol Administration in Treasury a. Denial of an application for, or the suspension, revocation, or annulment of a basic permit b. Orders in re interlocking directorates

United States Court of Appeals for Administrative

Appeals

Supreme Court of the United States

Certiorari

Certified Question

subject to the rules of these numerous courts of general jurisdiction. Naturally, the rules cannot be promulgated with special reference to administrative agencies, no matter how unique their problems or how they may differ from those of the general litigant. When all of these cases are concentrated in one tribunal, however, with similar problems pertaining to all of them, the rules of that court can best be adapted for most efficient adjudication.

The rules[82] which the proposed court will adopt are bound to have a wholesome effect on proceedings by the administrative agencies themselves. It may be advisable, in this connection, also, to provide that the court shall have power to make rules respecting administrative procedure within the agencies, in so far as that procedure is reflected in the questions for reviews; for example, rules relating to notice, hearing, the reports of examiners, and exceptions thereto, arguments before the administrative agencies, the requirements as to findings, and the form and substance of orders. A court of this character may be able to effect uniformity in administrative procedure, in so far as such uniformity is necessary or desirable, and to insure a "fair hearing" to the parties affected. Evidently, this cannot be accomplished by the present numerous courts, with a few cases coming before each of them every year. The most they can do is to express an opinion with reference to the particular case under consideration.[83]

We shall now see how the aforementioned difficulties and complications of the present method of review and enforcement will be remedied by the proposed legislation, although a glance at the chart on the opposite page, as compared with the foregoing charts, should suffice.

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[82] Sec. 10 of the bill provides:

> The court is authorized to adopt rules respecting review of the orders and decisions coming before it; *the filing of a petition for review, the preparation of the record for review;* and the conduct of proceedings upon review, and the proceedings of the court and its divisions shall be conducted in accordance with such rules of procedure and practice as the court may prescribe.

[83] Compare Morgan v. United States, 304 U. S. 1, 58 S. C. 773, with In matter of petition of National Labor Relations Board, decided May 31, 1938, and National Labor Relations Board v. Mackey Radio and Telegraph Co., 304 U. S. 333 (1938).

(a) Types of Orders to be Reviewed.

The types of orders subject to review by the proposed court are limited to those which are: (1) final; (2) preceded by notice and opportunity to be heard; (3) there is an administrative record and (4) the statute provides for the right of review.[84] With these provisions, all differences now existing in the law in respect of the classes of orders subject to review will be obliterated, except as to the problems arising out of "negative orders" a review of which would entail the exercise of administrative functions. Even these orders may be uniformly included by a simple amendment in the bill to the effect that where no effective judicial decree may be rendered in reviewing an order or decision of the administrative authority, but a declaratory judgment may be properly entered, the party aggrieved by such order or decision may bring suit in this court under the Declaratory Judgment Act,[85] joining as parties defendant all officers of the Government against whom relief is sought. Upon such suit filed, the Court may then proceed to determine and declare the rights of the parties and may exercise the same powers for making its judgment effective as is provided in the Declaratory Judgment Act.

(b) The Reviewing Court.

The Bill provides[86] that the proposed court shall consist of a chief justice and ten associate judges; that each justice shall

[84] See No. 24 supra.

[85] 48 Stat. 955, 49 Stat. 1027, 28 U. S. C. 400.

[86] Sec. 3 of the bill provides:

The court shall be organized by the chief justice as follows:

(a) The chief justice and associate justices may each constitute a division of the court for the purpose of hearing and deciding appeals coming before the court.

(b) Special divisions, consisting of three or more associate justices, may from time to time be formed by the chief justice for the purpose of hearing and deciding appeals when in the judgment of the chief justice such special division is necessary to effect the expeditious administration of justice or a hearing by more than one justice is required by law. The chief justice shall designate the presiding justice of such division.

(c) The court may from time to time be divided by the chief justice into sections when in his judgment such division will expedite the administration of justice and permit the handling of related cases by justices who are expert and experienced in the subject matter thereof. The justices to constitute each section shall from time to time be designated by the chief justice with due regard for their several qualifications by way of learning, experi-

constitute a division of the court; the court may also be divided into sections for the handling of related problems by judges who are expert and experienced therein; and the decision of each division is made final, except that it may be reviewed by the entire court.

Several questions were raised with reference to these provisions in the course of the Hearings before the Senate Judiciary Committee.

First: Is a court of eleven judges sufficient to handle the work of reviewing orders of sixteen or seventeen agencies (if we include the newly created Civil Aviation Authority)? In the course of the hearings, a survey disclosed that during the calendar year 1937, 359 cases were brought from these administrative agencies to the Circuit Court of Appeals and the United States Court of Appeals for the District of Columbia, and 57 cases to the district courts, a total of approximately 420 cases. A court of eleven judges can undoubtedly handle this work, if we consider that each justice constitutes a division of the court.

Second: Is it desirable that each justice shall constitute a separate division to hear and determine appeals from such expert bodies as the Interstate Commerce Commission, the Federal Trade Commission, the Federal Power Commission, the Securities & Exchange Commission, etc? On this question there seems to be a difference of opinion.[87] The work of the court could un-

ence, and special training for the work of the section to which they are assigned.

(d) The decision of any division shall be deemed the decision of the court and shall be final unless, within thirty days from the date the decision is entered, the party of record adversely affected by the judgment, files a petition for a review of such decision by the whole court.

(e) The decision of any division of the court shall be reviewed by the court whenever, in the opinion of the chief justice, such review is necessary, or upon the written request of any associate justice.

[87] In my appearance before the Senate Judiciary Committee, I suggested that each division shall consist of three judges and that the following amendments be incorporated in the bill:

(1) That to Sec. 16 of the Bill (See Note 92 infra) be added:

"In such case, the proceedings may be had before a single justice and shall be reduced to writing, but the Chief Justice shall designate two additional justices to participate in the consideration and decision of the case."

(2) That subdivision (d) of Sec. 2 be eliminated. At present Sec. 2 of the Bill reads as follows:

doubtedly be more expeditiously handled, if the 420 cases were divided among 11 judges, and the work of each judge reviewed in chambers or in conference. On the other hand, there is great profit to be derived from the joint consideration of each case by three judges.

The question then arises whether the Court, acting in panels of three, could adequately handle over 400 cases per year, which would mean approximately four panels, each handling about 150

In addition to the duties of an associate justice of the court, the chief justice shall have powers and duties as follows:

(a) He shall preside over all sessions of the entire court.

(b) He shall preside at any hearing or other proceeding before the court or before any division thereof in which he shall participate, unless he shall otherwise direct.

(c) In case of inability to attend any session of the entire court, he shall designate an associate judge to preside over that session.

(d) He shall have power to divide the court into divisions and shall assign to each division such duties as he may deem necessary and proper. Where a division consists of three or more associate justices he shall designate the presiding justice.

(3) Sec. 3 of the Bill (see note No. 86 supra) be amended to read as follows:

The Court shall be organized by the Chief Justice as follows:

(a) *Any three associate justices, or the Chief Justice and any two associate justices, may constitute a division of the court for the purpose of hearing and deciding appeals coming before the court. The Chief Justice shall designate the presiding justices of the various divisions.*

(b) *The court may from time to time be divided by the Chief Justice into sections when in his judgment such division will expedite the administration of justice and permit the handling of related cases by justices who are expert and experienced in the subject matter thereof. The Justices to constitute each section shall from time to time be designated by the Chief Justice with due regard for their several qualifications by way of learning, experience and special training for the work of the section which they are assigned.*

(c) *The decision of any division shall be deemed the decision of the Court and shall be final. Any party of record aggrieved by a decision of a division may, within thirty days from the date the judgment is entered, petition for a rehearing of the case by the entire Court. A rehearing by the entire court shall be granted as of right, if the decision of the division was not unanimous and a certificate of importance is issued by the presiding justice of the division. In other cases, the Court may in its discretion grant a rehearing by the entire court. Seven justices shall constitute a quorum of the entire Court.*

cases. This may be compared with the work of the Circuit Court of Appeals, in which, during the fiscal year 1936, the average number of cases decided per panel was 235.[88] Yet, one must not forget that the Circuit Courts of Appeal are courts of general jurisdiction, where a case involving administrative law may be preceded or followed by one of contract or tort; a tax case may be followed by one in bankruptcy; a question of common law by one of statutory construction; etc. This great diversity of problems is bound to have a retarding effect on the efficiency and thoroughness of adjudication.

The work of the proposed court would be more specialized and related, and therefore a comparison with the Circuit Court of Appeals is not quite exact. A comparison may well be made with the Court of Claims, which, acting as a single court, disposed of over 470 cases in one year.[89] In other words, each panel of the proposed court would be required to handle only one third as many cases as are decided by the Court of Claims. If it is said, that despite this difference it may not be possible for the proposed court to handle as many cases because they are far more complicated than those arising in the Court of Claims, we may point to a counterbalancing element in the fact that the new court will be divided into sections, along lines of specialization. During the calendar year 1937, 243 cases went to the Circuit Court of Appeals from the Board of Tax Appeals. During the same period the Board, with 16 members, disposed of 5,043 cases, or approximately 315 cases per member. At this rate, with judges expert and experienced in tax law, it should not be necessary to have more than three judges in the section handling internal revenue cases, leaving eight judges for one half of the cases not as closely related.

Whether acting in divisions of one or three, it seems reasonable to assume that eleven judges will be able to handle the work of the proposed court. Nor would eleven judges be too many. In the beginning, the great task of the court will be to unify and systematize our body of administrative law, and all the time and effort of the judges will be required to that end. As we approach that goal, it may be expected that the amount of litigation will diminish, or many cases be disposed of with less effort. In the meantime, however, we must look for an increase of new admin-

[88] See note No. 7, supra.
[89] See note No. 7, supra.

istrative problems from the new agencies, which are likely to be established. If the court's efficiency will materially diminish its work; its jurisdiction can be expanded by Congress to cover agencies not now included in the bill. If Congress does not take such steps, and the work of the court continues to diminish, the Chief Justice of the United States may, under Sections 13, 15, 17 and 18 of the Judicial Code, assign the justices of this court to other courts, and thus alleviate the pressure of work in those tribunals.[90]

Third: A question has been raised as to the desirability of a court consisting of experts. It was argued before the Judiciary Committee that while it is desirable for administrative agencies themselves to consist of experts, the judges of a reviewing court should be men well grounded in the law. But the bill does not preclude the appointment of judges learned in the law, by any means. On the contrary, it is the purpose of the bill that the judges appointed by the President, with the advice and consent of the Senate, would have qualifications at least the equivalent of the judges of the Circuit Court of Appeals, and in addition, be expert in some field of public law. The choice, therefore, is not as between those who are expert in one field and those who have a broad view of the law, but as between the latter and those who, in addition, are experts in administrative problems.

If we look upon the law as a set of legal propositions divorced from the facts, then there is good reason for the contention that, while administrative agencies should consist of men "appointed by law and informed by experience", the reviewing court should be trained in the application of intricate and abstruse mechanical rules of law. But where the law is interwoven with the facts, where the task of the judge is to determine whether an administrative finding is supported by substantial evidence, and, therefore what would constitute substantial evidence in an intricate case; when a reviewing court is confronted with the task of determining whether a finding supports an order, which necessitates consideration of the facts in the field of regulation; where it becomes necessary to interpret statutory provisions with reference to the facts relating to the operation of railroads, power developments, trade regulation, labor relations, taxation of business, etc., it is far better to have judges who are well acquainted

[90] 28 U. S. C. 17, 19, 22.

with those facts than judges who would dispose of such facts "in an intellectual vacuum."[91]

No doubt, experts do develop their "pet" theories and often disagree. Our legal professional experience, however, is not a criterion for the extent of disagreement among experts, if we gauge that disagreement by what they say on the witness stand. There they are paid to disagree. Ordinarily their disagreements do not run the gamut of all the facts in their field of specialization. When they disagree, they do so with reference to some abstruse point beyond the ken of the layman. If their disagreement is merely a matter of difference in testimony as to ordinary facts, it is important that the judge be well acquainted with the facts in order to resolve their conflict; but if their disagreement is a genuine conflict of experts, then a still greater expert is needed, rather than a judge who might as well flip a coin to determine who is right. There is no virtue in the proposition that where two experts disagree, their differences may be resolved by one who is not sufficiently informed.

Fourth: There seems to be some objection to the proposed court on the ground that this is a step towards the "centralization" of justice. The argument advanced is that this would impose a greater burden on the poor litigants than if they could appeal to the district court within their own state or the circuit court of appeals within their circuit. The importance of this argument is exaggerated. The number of poor litigants who seek reviews of the orders of administrative authorities are few indeed, and the location of the court often has no relation to the expense involved. A petition for review may be filed in the Ninth Circuit, with counsel for the private party located in New York, or in the Second Circuit when counsel for the private party is in Minnesota.

But the argument is answered by the provision that the proposed court shall be ambulatory.[92] Any party desiring to have the case heard in the field may have that privilege. Each justice,

[91] 301 U. S. 1, 41 (1937).

[92] Section 16 of the bill provides:

> The court shall be located in the District of Columbia, where its general sessions shall be held: but whenever, in the opinion of the chief justice, the convenience of the public or of the parties may be promoted or delay or expense prevented thereby, a division of the court may hold special sessions in any part of the United States.

constituting a division of the court, may be periodically assigned to hear a number of cases in the field. Then, after the hearing, he can return to the home base to write his opinions. If such division is to consist of three judges, provision may be made whereby only the presiding judge of the division will go into the field, hear oral argument, which may be recorded verbatim, and then upon his return to Washington, the case may be considered and decided by him, together with the two other judges of the division.[93]

The argument against "centralization of justice", however, has another aspect to it. It is said that in a vast land like ours, with such different prevailing conditions, the law should be applied by judges who are acquainted with local conditions in the respective communities. This is an argument which is very sound as applied to local problems, especially, those arising under the common law. To take some simple illustrations: A personal injury, caused by an elephant, may have different legal consequences in India than in the United States; trespass committed by cattle may have different legal consequences in the rural communities of the western states than in the thickly settled eastern states, etc. But here we are dealing with federal administration, which ordinarily implies a uniform application of laws throughout the United States. If Congress intends a law to have a different application in one locality than in another, it should so provide in the statute. For example, in the Wages and Hours Law[94] Congress could have made provision for wage differentials as between the North and South. Without such provision, however, it is neither for the administrative agency nor the courts to give different applications to the law in the different localities. Both are bound by the law, and it makes little difference whether, in applying a law of nationwide scope, the judge hails from one locality or another.

If the application of the law depends upon facts varying in different localities, the existence of those facts must be reflected in the record made before the administrative agency. The parties before the agencies will no doubt bring forth all the pertinent facts which have a bearing on the matter for decision. If the facts peculiar to a locality do not appear in the record, it is

[93] For this reason, I suggested that Sec. 16 be amended as indicated in Note No. 87 supra.

[94] The Wages and Hours Act, Public No. 718, 75th Cong. 3rd Sess.

not permissible for the judge to substitute his own knowledge, judgment, and experience for the record in the case. This is so under existing law and under the Logan Bill.

If the facts peculiar to the locality do appear in the record, and the administrative agency has given effect to them, then the peculiar knowledge of the judge concerning those facts plays no part in the adjudication. If, on the other hand, the administrative agency after considering those facts, finds that they are not sufficient to disturb the general rule, and the function of the court is to determine whether there is substantial evidence to support the findings, order, or decision, the acquaintance of the judge with local conditions plays no part in the determination of the question. It can conceivably play a part, if the function of the court is to weigh the evidence in order to ascertain whether the administrative agency arrived at the correct conclusion. But that also is not permissible under existing law.

(c) Scope of Review.

We now come to the question of the scope of review to be exercised by the proposed court. We have seen the complications which arise on account of the many and diverse statutory provisions and in the applications of those provisions by the courts. The Logan Bill does away with all the statutory differences. The review is limited to questions of law, and the findings of fact, if supported by substantial evidence, are made conclusive.[95] If, however, it becomes apparent that the application of the law depends upon additional facts not made of record, and there was reasonable ground for the failure to adduce those facts, the court may remand a case to the administrative authority for further proceedings.[96]

[95] Section 11 of the Bill provides:

The review by the court shall be limited to questions of law, and findings of fact of the commission, administrative authority, or tribunal, if supported by substantial evidence, shall be conclusive.

[96] Section 12 of the Bill provides:

If either party shall apply to the court to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence at the hearing of the cause, the court may order additional evidence to be taken before the tribunal or authority and the tribunal or authority may modify its findings as to facts by reason of the additional evidence, and it shall file such modified new findings which if supported by evidence shall be conclusive, and it may file its recommendations for the modifying or setting aside of the original order or decision.

These provisions will bear further comment. The Logan Bill takes seriously the proposition that it is the primary function of a court to apply the law upon the facts presented. Whether those facts are presented through a trial in court, or through a stipulation of the parties, or through a determination of another tribunal, is only incidental to the primary function of the court. No limitations are imposed on this function, except that it is limited to a review of those objections which had been raised before the administrative agency.[97] This is a sound corollary of the requirement that all administrative remedies must be exhausted before resort may be had to the courts.

Congress has recognized this requirement in some statutes, even to the extent of requiring that application for rehearing be filed before an administrative agency, as a condition precedent to a petition for review by the courts, and provided that the review shall be limited to the questions raised in the application for rehearing.[98] In many instances, without statutory provision, it is the practice to file a petition for rehearing and to limit the application for review to those questions. But in most instances there is no well-defined limit to the scope of review which may be exercised by the courts, either on the questions of fact or questions of law.

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[97] Section 5 of the Bill provides:

(a) The decisions and orders of the commissions, administrative tribunals, and authorities designated in section 5 may be reviewed by the court if a petition for such review, *praying that such decision or order be reviewed, set aside, or modified in whole or in part* is filed with the clerk of the court by either party within sixty days after the decision or order is promulgated or issued.

(b) No objection to an order or decision shall be considered by the court unless such objection shall have been urged before the commission, tribunal, or authority issuing the decision or order from which the appeal is taken.

(c) *Upon filing a petition for review, a copy of such petition shall be forthwith served by the petitioner upon the Commission, tribunal or authority issuing the order or decision, and the commission, tribunal, or authority shall certify and file with the court a transcript of the record upon which the order or decision complained of was entered. The transcript shall contain the notice or petition, the pertinent pleadings, if any, the relevant evidence, the findings of fact, and the order or decision appealed from.*

(d) *Upon such review the court shall have power to affirm or if the decision or order of the tribunal, commission or authority is not in accordance with the law, to modify or reverse, such decision or order with or without remanding the case for a rehearing as justice may require.*

[98] Section 313 Federal Power Act, 49 Stat. 860, 16 U. S. C. 825*l*.

As to the review on the facts, the Logan Bill adopts the generally accepted rule that the findings shall be conclusive, if supported by substantial evidence, but does not favor one administrative authority over another. Some who appeared in opposition to the bill seemed to regard this rule with disfavor. The horror sometimes expressed about conclusiveness of administrative findings would suggest that this rule originated with Congress. As a matter of fact, Congress was not the originator of the rule that administrative findings shall be conclusive. It originated with the Supreme Court in the following manner.

Prior to 1906, section 16 of the Interstate Commerce Act[99] made all findings of the Interstate Commerce Commission *prima facie evidence.* In reviewing the Commission's findings, the courts have followed this rule in reparation cases, but gave greater weight to the Commission's findings in rate making cases. The reason for this difference lay in the fact that in the former class of cases, the courts merely followed the procedure laid down by Congress, while in the latter, there was the additional factor that the Commission was acting in a quasi-legislative capacity. In reviewing these findings, therefore, the courts had to guard against exceeding their judicial powers and taking over a legislative function. Then Section 16 of the Act was amended.[100] Congress made the Commission's findings as to facts in reparation cases *prima facie* evidence, and nothing at all was prescribed concerning the weight to be attributed to the Commission's findings in other types of cases. The course of Judicial decisions, after the amendment of Section 16 has established the rule that the Commission's quasi-legislative findings shall be conclusive.[101]

The next step was the enactment of the Federal Trade Commission Act, where the findings of the Commission acting in both a quasi-legislative and quasi-judicial capacity were made conclusive, if supported by testimony. Since then, many statutes were enacted in which administrative findings were made conclusive if "supported by evidence", or "supported by substan-

[99] 24 Stat. 384, 25 Stat. 859.

[100] 34 Stat. 590.

[101] Hankin, Gregory: Conclusiveness of Federal Trade Commission's Findings as to Facts, 23 Mich. L. Rev., 233, *237;* McFarland, Carl: Administrative Agencies in Government and the Effect Thereon of Constitutional Limitations, p. 3; Sharfman, Interstate Commerce Commission, Part II, p. 385.

tial evidence." If the rule laid down by the Supreme Court, in respect of the quasi-legislative findings of the Interstate Commerce Commission is taken as the criterion of the proper weight attributable to such findings of administrative agencies in general, then such phases as "if supported by evidence" or "supported by substantial evidence" must be regarded as words of limitation, rather than words expanding the powers of administrative agencies.

In the course of the past twenty years, however, the difference between the weight attributable to quasi-legislative and quasi-judicial findings has vanished, because the findings of the Board of Tax Appeals, though judicial in character, have been held to be conclusive, if supported by substantial evidence, though without any statutory provisions to that effect.

Whether administrative findings are quasi-legislative or quasi-judicial, there is no reason why a reviewing court should re-try facts, thus determined, any more than facts determined by a trial court. On the contrary, there is less reason for it. The administrative findings are determined by men expert and specialized in the intricate problems, which come before their respective tribunals. No great principle is served by having those facts redetermined by a jury or a court, which does not possess that expert knowledge. If the real reason for the opposition to the finality of administrative findings goes to the accuracy of the findings, then the remedy lies in an appeal to the appointive power of the President and the Senate, rather than in the abandonment of the wholesome rule that facts determined by a specialized and expert tribunal should not be retried by a reviewing court.

(d) Conflict of Decisions.

With an appeal to one court, rather than approximately one hundred courts, the probabilities of conflicts are bound to be reduced to a nullity. But we may expect much more than the mere elimination of conflicts limited to cases with the same class of facts. When we speak of conflicts we mean, for example, different decisions relating to the same section of the internal revenue laws with a practically identical state of facts. It would be too much to insist on a uniformity of principles, rules, standards and conceptions in the development of the entire body of

administrative law. This is possible only if their formulation is within the control of a single tribunal.

There will undoubtedly be differences of opinion among the justices themselves, and conflicts may even arise among the divisions of the court, but those conflicts, if it is to be expected, will be eliminated through a review by the entire court. The bill provides that petitions may be filed for review of a decision of a division by the entire court, and such review must be granted, if the chief justice deems it necessary, or upon the written request of any associate justice. If the divisions are to consist of three justices, some provision may be made whereby in cases of importance, a review may be had by the entire court hearing the case.[102] In this manner, there is no reason why conflicts should persist in the court's own decisions.

Judicial Enforcement of Orders.

We shall now turn to the civil enforcement of the orders and decisions of administrative authorities. We have pointed out the difference between the enforcement of the orders of the Interstate Commerce Commission and those of the other agencies. The Logan Bill vests jurisdiction in the district courts to enforce administrative orders, in the same manner as is now provided with reference to the orders of the Interstate Commerce Commission.[103] The jurisdiction might as well have been vested in the

[102] See note No. 87 supra.

[103] Section 17 of the bill provides:

(a) If any fails or neglects to obey any order of a commission or administrative authority which may be reviewed on appeal as provided in this Act, when such order has become final and no stay of execution has been granted by the court, and while the same is in effect, whether a petition for review has been filed or not, the commission or any party injured thereby, or the United States by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing that court determines that the order was regularly made and duly served, that it has become final, and that the person is in disobedience of the same, the court shall enforce obedience to such order by writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to same. And the court shall assess a fine not to exceed $100 per day for each day such person fails or neglects to obey such order.

(b) *This court shall have the power to enforce its mandates and orders and nothing in this section shall be construed to diminish or take away such power.*

(c) Definitions—As used in this section, the word "person" includes a corporation, partnership, or trust.

proposed court without fear of overburdening that court, because with a provision of this type there will hardly be any cases for the enforcement of administrative orders.

There is no particular hardship exerted by this type of enforcement provision. One who questions the validity of any order has his remedy by way of a review of that order by the proposed court. If he does not avail himself of this remedy, he should not have the privilege of flaunting government authorities until some local judge of another court might hold the order invalid. The administrative order should become unappealable, and the only question which should be open to judicial determination is whether the order has been disobeyed.

III. THE PROBLEM OF EXPENSE.

The work of reviewing the decisions and orders of administrative authorities can thus be handled more expeditiously, efficiently and with greater understanding by the proposed court than by the one hundred federal courts. What is to be gained in uniformity and efficiency in administrative law would alone be worth the additional expense involved in setting up this new tribunal, if indeed this would entail additional expense. It is true Congress has just made provision for the appointment of twenty additional federal judges,[104] but with the expansion of federal law, and with the obliteration of state lines in business relationships, the work of the federal courts is bound to increase. Even now it is felt that the additional judges are not sufficient to relieve the pressure of work in those courts.

The Logan Bill would relieve this pressure by taking out of the courts of general jurisdiction those intricate administrative problems. A thorough consideration of those cases by a specialized court under the procedure outlined in the Logan Bill would involve by far less work and less expense than by courts of general jurisdiction.

IV. NEED FOR FURTHER DISCUSSION.

The Logan Bill, if enacted into law, will have very far reaching consequences, which, in my opinion, will be very desirable. But that is a subject on which views may differ. It is important that the legal profession take an active interest in this proposed

[104] Public No. 555, 75th Cong.

legislation. The open minded approach on the part of Senator Logan is most commendable. Throughout the hearings, he took the position that the bill is not in final form. He introduced the bill with the hope that valuable suggestions will flow out of the interest and discussion by the profession, which might be incorporated in the final draft.

Some of the criticisms and suggestions have been very helpful in clarifying the muddy waters of judicial review over administrative action. Some of these I have attempted to answer. Others remain to be answered, although they may be regarded as demurrable complaints, rather than as reasons in opposition to the bill.

First. One of the complaints is that the bill smacks too much of foreign ideas, specifically, the French system of administrative law. Under the French method, the actions of administrative officers are reviewed exclusively by administrative tribunals, not by the judicial courts except to the extent that the Tribunal of Conflicts, consisting of members of the highest administrative and the highest judicial courts, determines whether a doubtful case is to proceed in the administrative or in the judicial system. This criticism is not correct, because the proposed Court of Appeals for Administration is to be a regular constitutional court, not exercising any administrative functions.[105]

Even if the charge were correct, this should not condemn the bill. The French system of administrative law is the logical corollary of our own concept of separation of powers which we borrowed from the French and which we incorporated in our constitutional system. A dichotomy of tribunals, insuring the supremacy of each of the three branches of the government within its own sphere would not be in opposition to but rather in accord with our constitutional system. But whatever may be the advantages or disadvantages of the French system, its establishment is not the purpose and effect of the Logan Bill.

Second. Administrative finality is regarded by other critics as "administrative absolutism,"[106] and starting with that

[105] See Williams v. United States, 289 U. S. 553 (1933); United States v. O'Donoghue, 289 U. S. 516 (1933); See also Katz, Wilbur G.: Federal Legislative Courts, 43 Harvard L. Rev., 884, and the distinction between legislative and constitutional courts, 43 Yale Law Journal, 316.

[106] See report of the Special Committee on Administrative Law of the American Bar Association, 61st Annual Meeting, July, 1938.

hypothesis they come to the conclusion that all administrative action must be subject to complete judicial review by courts of general jurisdiction, to insure a constant safeguard for our liberties. It may be conceded that at times administrative agencies have acted, without adhering to the standards of fair play which attend the procedure in our courts. But this does not warrant the difference in approach toward the three branches of the government. The rule of law pronounced by the legislature or the executive is often deemed "arbitrary, unreasonable, capricious and oppressive". but if the same rule of law is laid down by the courts, a different reaction will be evoked. By way of illustration, one may recall the opinion written some three years ago by the Lawyers Committee of the American Liberty League on the constitutionality of the National Labor Relations Act. From that opinion, it would appear that Congress had acted in an arbitrary, unreasonable, and oppressive manner. But when the Supreme Court upheld the validity of the Act in the Labor Relations Cases,[107] all doubts concerning the reasonableness of the same rule of law seemed to have vanished.

This difference in approach is not always justified. If disagreement with legislative and executive policy is cause for designating it as "arbitrary, unreasonable and oppressive", the same epithets may be directed against the judiciary. For example, if the enactment of the Minimum Wage Law for the District of Columbia[108] may be characterized as "an arbitrary exercise of power", so also must be the recent decision of the Supreme Court on the Washington State Minimum Wage Law.[109]

This difference in approach is sometimes manifested in an unwarranted assumption, at times aided by the judiciary, that unless administrative action is subject to judicial review, the administrative agency is vested with arbitrary powers.[110] The presumption in favor of reasonableness and regularity of administrative action is cast aside. But in the case of the judiciary, we never assume that the exercise of power is arbitrary, though there may be no further review.

Third: One critic was opposed to a special court for special cases, saying that he would want "strong and cogent reasons, and

[107] 301 U. S. 1, 49, 58 (1937).
[108] See Adkins v. Children's Hospital, 261 U. S. 525 (1923).
[109] West Coast Hotel Co. v. Parrish, 300 U. S. 379 (1937).
[110] Intermountain Rate Cases, 234 U. S. 476, 490 (1914).

clear reasons, for abandoning that basic common law concept of the supremacy of the law." Senator Logan and all proponents of this bill would agree with that thought. But what principles of the common law dictate that specialized cases should not be adjudicated by specialized courts?

If by the "supremacy of the law" the critic means that the rule of law, rather than the inclination of the individual administrators or judges, should control, that no governmental action should depend on the whims of those in authority, but that their action must find a basis in the provisions of law or their necessary implications, then an appeal to the proposed court, rather than the Circuit Court of Appeals or the district court, would not diminish the supremacy of law.

If the criticism is directed against the proposition that this court will specialize in cases in which some agency of the government is always the defendant, that it is to be a *government court,* then the answer is that all courts of the United States are integral parts of the Federal Government. Furthermore, the Court of Claims, the Customs Court, and the Court of Customs and Patent Appeals are likewise courts in which the Government is always a party. If there is a feeling on the part of counsel for private persons that these courts decide cases too often in favor of the Government, there is often a like feeling on the part of counsel for the Government that the courts lean too heavily in favor of private litigants. The greatest offender in this respect might then be the Supreme Court of the United States, because there the Government wins most of its cases. But we must remember that the Solicitor General is careful that only meritorious cases are taken to the highest court.

If the criticism means that review of administrative action must be attended by all the burdens of common law procedure and that a trial *de novo* be had on all questions of law and fact, then, in answer, it is sufficient to say that procedure is only an instrument and not the end of justice. Another writer, equally opposed to the Logan Bill, pointed out[111] that while the Court of Claims, consisting of five judges and six commissioners, following the common law procedure, was able to dispose of 473 cases in one year, the Customs Court, consisting of nine judges, with no com-

[111] McGuire, O. R.: Judicial Review of Administrator Decisions, 26 Georgetown L. Jr., 574.

missioners, not following the common law procedure, was able to dispose of 71,492 cases and write approximately 3,500 opinions during the same year. If he is correct in attributing this tremendous difference in the efficiency of the courts to the type of procedure followed, then, procedure should be modified to meet the need of efficient administration of justice.

The object of the Logan Bill is to unify and systematize judicial review of governmental action in the midst of our era of expanding governmental activity. The bill is fully responsive to the following policy adopted by the American Bar Association at its Sixty-first Annual Meeting held in July, 1938:

> "There should be unification and simplification of the modes of judicial review. So far as possible a notice of appeal, specifying the determination, ruling or order complained of, the grounds of objection thereto, and the relief sought, lodged with the commission, tribunal, board or administrative agency in question, and provision for bringing up to the court the record of administrative action or requiring full disclosure of the nature and details of such action and the basis thereof and the mode of arriving at any determination involved therein, should suffice."